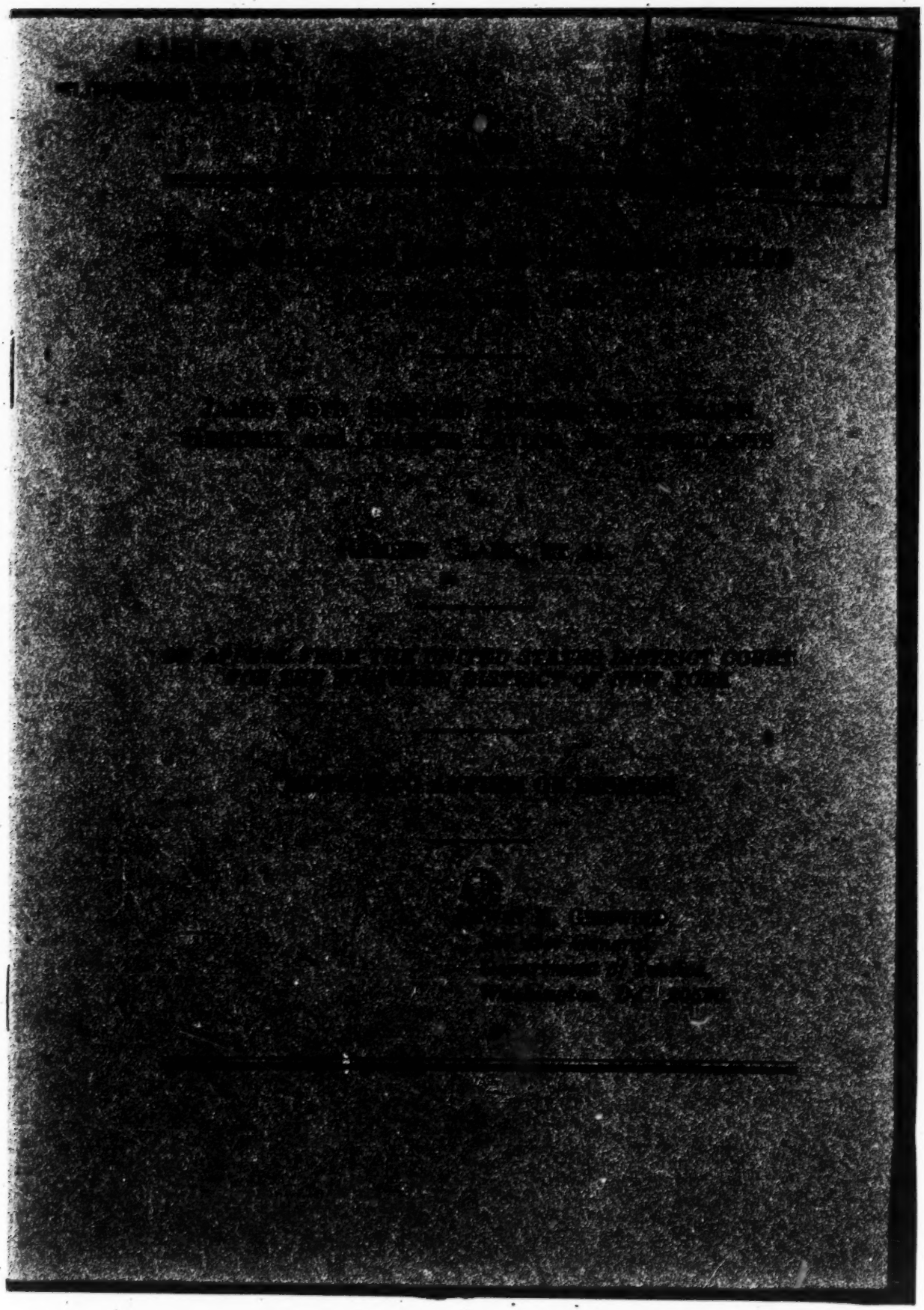

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 490

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR., APPELLANTS

v.

RAMSEY CLARK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16(1) of the Rules of this Court, appellees move to affirm the judgment of the district court or, in the alternative, to dismiss the appeal.

STATEMENT

Appellants, four Selective Service registrants, brought the instant action to challenge the constitutionality of the system of draft deferments for college students provided for in Section 6(h)(1) of the Military Selective Service Act (50 U.S.C. App. (Supp. III) 456(h)(1)). They contended that the availability

of such deferments discriminates against those financially unable to attend college, and bears no reasonable relationship to the purposes of the Act. A three-judge district court was convened. The court, one judge dissenting, dismissed the action on two grounds: (1) that pre-induction judicial review of Selective Service classifications is prohibited by Section 10(b)(3) of the Act (50 U.S.C. App. (Supp. III) 460(b)(3)); and (2) that appellants had failed to show that the $10,000 jurisdictional amount required by 28 U.S.C. 1331 for federal question jurisdiction was involved (J.S. App. 1a-7a, 18a-19a). The latter ground of dismissal was based on counsel's concession that none of the plaintiffs could prove a monetary loss of more than $10,000 because of the discrimination alleged. The district court stayed the induction of two of the appellants—Boyd and Taylor—pending the disposition of this appeal. The other two plaintiffs—Hughes and Hendrix—received deferments while the action was pending, and thus do not now face induction.

ARGUMENT

1. The district court correctly held that it lacked jurisdiction because the matter in controversy does not exceed $10,000. In suits brought by Selective Service registrants to enjoin their induction, the only available grounds for federal jurisdiction are the general grants of federal question and diversity jurisdiction, both of which apply only where "the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs" (28 U.S.C. 1331,

1332).[1] It has been repeatedly held that actions asserting rights not capable of monetary valuation do not satisfy the requirement of jurisdictional statutes which require that the matter in controversy exceed a specified dollar sum. *Barry* v. *Mercein*, 5 How. 103 (right to custody of a child); *Kurtz* v. *Moffitt*, 115 U.S. 487, (writ of habeas corpus); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (bank's suit to enjoin administrative subpoena which would "unlawfully expose its business affairs" and "lessen public confidence"); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (C.A. 2) (inquisition of lunacy); *Giancana* v. *Johnson*, 335 F. 2d 366 (C.A. 7) certiorari denied, 379 U.S. 1001 (action to enjoin FBI agents from conducting close surveillance of plaintiff). See, also, *Hague* v. *C.I.O.*, 307 U.S. 496, 507-508.[2] This rule was recently applied in the Selec-

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[1] The Administrative Procedure Act does not provide a basis for federal jurisdiction over such suits, for Section 13 (b) of the Military Selective Service Act provides that "[a]ll functions performed under this title * * * shall be excluded from the operation of the Administrative Procedure Act * * * [except as to section 3 of the APA, pertaining to publication of agency regulations]" (50 U.S.C. App. 463(b)). Nor does the Military Selective Service Act itself confer jurisdiction. Even if it were held that Section 10(b)(3) of the Act does not preclude jurisdiction in pre-induction civil suits, neither that section, nor any other provision of the Act, can be construed as an affirmative grant of federal jurisdiction.

[2] In *Hague*, involving an injunctive suit against city officials to protect First Amendment rights, a majority of the Court (although disagreeing on a subsidiary point) sustained jurisdiction under 28 U.S.C. 1343(3), on the explicit or implicit premise that jurisdiction did not lie under 28 U.S.C. 1331 (see 307 U.S. at 507-508 (opinion of Roberts, J.), 519, 527-

tive Service context to require proof of the jurisdictional amount under Section 1331 in a suit to review reclassifications, in a case decided before the enactment of the statutory bar on pre-induction judicial review. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (C.A. 2).

The congressional purpose behind Section 1331 might have been simply to keep "petty" cases out of the federal courts, as the dissenting judge suggested (J.S. App. 13a-15a). And this case may well be viewed as involving a "substantial" enough claim to warrant the attention of the federal courts (see S. Rep. No. 1830, 85th Cong., 2d Sess., pp. 3-4). However, to achieve its purpose Congress adopted a monetary standard, which the courts are not free to ignore in a particular situation where it operates to keep a case deemed otherwise significant out of the federal courts. In the various Civil Rights Acts and in other statutes Congress has conferred federal jurisdiction without regard to the amount in controversy. *E.g.*, 28 U.S.C. 1343, 1344, 1337, 1338, 1339, 1340, 1346; 46 U.S.C. 688 (Jones Act); 45 U.S.C. 51 *et seq.* (Federal Employers' Liability Act). That Congress has not done so for cases like this one may well result in an "unfortunate gap in the statutory jurisdiction of the federal courts." *Wolff* v. *Selective Service Local Board No. 16*, *supra*, 372 F.2d at 826. But that seems to be the effect of the plain language of Section 1331.

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532 (opinion of Stone, J.), 532 (opinion of Hughes, C.J.)), The dissenting Justices indicated no contrary view (see 307 U.S. at 532-533).

There is no conflict of decisions on this point. The cases to which petitioner refers (J.S. 13) were damage suits in which the complaint asserted a claim for a sum over the required amount, and it was possible that a jury would award that amount. *E.g.*, *Wiley* v. *Sinkler*, 179 U.S. 58 (damage claim for rejection of vote), distinguished in *Hague* v. *C.I.O.*, *supra*, 307 U.S. at 507. In the instant case, on the other hand, there is no claim for damages, and no alternative basis for establishing a monetary value to the claim in the required amount. Indeed, although they initially alleged that $10,000 was involved, appellants now concede that they cannot justifiably make such a claim and simply maintain that it is unnecessary for them to be able to do so for jurisdiction to exist.

2. Appellants in effect contend that the jurisdictional amount limitation is unconstitutional as applied to any case challenging the action of a federal official, at least where a constitutional claim is asserted. In such a case, they say, the New York courts will refuse to take jurisdiction, and, accordingly, to bar federal jurisdiction would be to deny all possibility of judicial relief. However, the question of whether or in what circumstances a State court may review the actions of federal administrative officials is by no means clear. On the one hand, the New York Court of Appeals has held that it will not "control the manner in which a federal agency performs * * * its functions and duties under * * * federal statute where the Federal government has exclusive jurisdiction." *Matter of Schmoll, Inc.* v. *Federal Reserve Bank*, 286

N.Y. 503, 509, 37 N.E. 2d 225, 226, certiorari denied, 315 U.S. 818. But the court of appeals has also stated that it will "uphold the power of a State court 'acting within the field of its allotted jurisdiction, to enforce rights created by federal statute and to remedy wrongs committed by federal officers under color of authority granted by federal statutes.'" *Wasservogel* v. *Meyerowitz*, 300 N.Y. 125, 133, 89 N.E. 2d 712, 716, quoting from *Matter of Schmoll, Inc.* v. *Federal Reserve Bank*, *supra*. The decisions of this Court and other courts on the point are not clear. See Hart and Wechsler, *The Federal Courts and the Federal System*, 388-391. The lack of a remedy in the State courts should be clearer if it is to be invoked as a basis for holding a long-established statutory limitation on federal jurisdiction to be unconstitutional.[3]

Moreover, as we point out below in discussing Section 10(b)(3) of the Military Selective Service Act, Congress may, as a general matter, constitutionally limit a registrant's judicial remedies to post-induction proceedings. Accordingly, if this is also the effect of the jurisdictional amount limitation in 28 U.S.C. 1331, that statute is not thereby rendered unconstitutional.

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[3] Moreover, even if the State courts are not available, this does not mean that appellants are wholly without an avenue to have their claim considered judicially. If they have standing to make the claim at all, it would appear that it could be raised in a habeas corpus action brought after induction or in defense to a criminal prosecution for failure to submit to induction (see *infra*, p. 7).

3. For the reasons set forth in our brief filed in *Oestereich* v. *Selective Service System Local Board No. 11*, No. 46, this Term, and in our Jurisdictional Statement in *Clark* v. *Gabriel*, No. 572, this Term, we believe Section 10(b)(3) of the Military Selective Service Act constitutes a valid bar to judicial review before induction of administrative action classifying or processing a Selective Service registrant.[4] After induction the registrant may obtain judicial review in a habeas corpus action or in defense to a criminal prosecution for failure to submit to induction. Requiring the registrant to wait until that time is justified by the need to prevent "litigious interruptions" in the induction process (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)).

Some question may be raised about the intended application of Section 10(b)(3) in a situation like the present one. Appellants did not seek to challenge the propriety of their I-A classifications as such, but rather the constitutionality of the II-S deferments granted to college students under Section 6(h)(1) which, they asserted, were unavailable to them, as a practical matter, because of their financial circumstances. As a result, they contended, the likelihood of their induction was enhanced and the time thereof accelerated. Appellants' claim thus did not involve

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[4] As pointed out by the court below (J.S. App. 4a), Section 10(b)(3), as amended in 1967, simply confirmed and made explicit the rule which had previously been evolved in decisions of this Court and various courts of appeals, the substance of which was that Selective Service classifications were not judicially reviewable prior to a registrant's induction. *E.g.*, *Witmer* v. *United States*, 348 U.S. 375, 377.

the typical challenge to a local board's action which seeks to question the grounds on which a particular classification is determined. On the other hand, entertaining appellants' action—and similar challenges to various provisions of the Act—would entail the same sort of delays in the induction process as the more typical pre-induction suits which Congress had specifically in mind in enacting Section 10(b)(3). Indeed, two of the appellants here have received stays of induction pending disposition of this appeal, and if the same treatment is to be accorded to every registrant with a I-A classification who makes such a claim, this would seriously impair the effective functioning of the Selective Service System, and might even render it inoperable while the matter was *pendente lite*. Thus, the congressional purpose to prevent "litigious interruptions" would seem to be even more directly involved when the suit does not depend on the particular facts of the plaintiff's own situation, but rather raises points that implicate many other registrants similarly subject to induction.

It may well be, as the dissenting judge below pointed out, that a I-A classification represents a "contingent liability of a very painful sort" (J.S. App. 10a), and, absent countervailing considerations, this might well be a judicially cognizable injury. But Congress has determined that the need to prevent "litigious interruptions" in the induction process ordinarily requires postponement of judicial relief until after induction. The "contingent liability" to which appellants are subject is no greater than the liability of any registrant with a I-A classification,

and thus appellants can make no claim for special treatment. Nor is there merit to the suggestion by the dissenting judge (J.S. App. 12a) that after induction appellants will lose their standing to challenge the constitutionality of the II-S deferments given to others. If a registrant ever has standing to challenge the constitutionality of deferments given other registrants (see *Talmanson* v. *United States*, 386 F. 2d 811, 812 (C.A. 1)), he would have standing no less after than before induction, since the granting of deferments to others would affect the order in which a registrant without a deferment is called for induction, and thus the propriety of his induction at the time it occurred.

4. At all events, although the district court dismissed appellants' action "for lack of a justiciable controversy and for want of jurisdiction" (J.S. App. 7a), it appears clear that their underlying claim is lacking in substantial merit. In essence, their contention is that Congress could not constitutionally determine that the national interest is served by postponing the military training and service of those draft-eligible individuals who are "satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment" (50 U.S.C. App. (Supp. III) 456(h)(1)). Appellants maintain that the very existence of deferments for college students works a discrimination against those without funds to attend college, and that Section 6(h)(1) is thus invalid on its face. But it is a contemporary commonplace that those otherwise qualified to attend college have

available to them a large array of scholarships, loans and other forms of financial assistance, from government and private sources. Moreover, the purpose underlying the Military Selective Service Act is to establish "a system of selection which is [not only] fair and just," but one "which is [at the same time] consistent with the maintenance of an effective national economy" (50 U.S.C. App. 451(c)). Section 6(h)(1) is plainly related to the achievement of that objective, for it simply seeks to allow those interested in doing so to complete their college education before being required to perform military service. Under that section, those granted II-S deferments are ineligible for certain other exemptions and deferments upon completion of college, and "upon the termination of such deferred status or deferment, and if qualified, [are] liable for induction as a registrant within the prime age group irrespective of his actual age" (50 U.S.C. App. (Supp. III) 456(h)(1)). In addition, a II-S deferment in any event expires when the registrant reaches the age of 24, although still enrolled in college.

In short, Congress has determined that it is in the national interest to encourage persons to obtain a college degree before being required to serve in the Armed Forces, should they choose to do so. It has also made a variety of educational benefits available to those serving in the Armed Forces and particularly to those who have completed their military service. Section 6(h)(1) is a reasonable part of this overall pattern, and appellants' constitutional challenge is thus without substance. Accordingly, the judgment

below dismissing their complaint was correct, regardless of the propriety of the jurisdictional grounds on which the district court relied. That judgment might therefore be affirmed on this ground, without reaching those questions. See, *e.g.*, *Rabinowitz* v. *Kennedy*, 376 U.S. 605, 607.

CONCLUSION

For the reasons stated, the judgment below should be affirmed, or, alternatively, the appeal dismissed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1968.

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